International Harvester Company *and* David Vandermeer and Robert Ballard

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local Union No. 1145 *and* David Vandermeer *and* Robert Ballard. Cases 33-CA-6119, 33-CA-6158, 33-CB-1828, and 33-CB-1845

25 June 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 25 November 1983 Administrative Law Judge Sidney J. Barban issued the attached decision. The Respondent Union and the General Counsel filed exceptions and supporting briefs. The General Counsel filed an answering brief in opposition to the Respondent Union's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.

We agree with the judge's finding that the Respondent Employer violated Section 8(a)(1) and (3) and that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by enforcing a provision of their collective-bargaining agreement which accords preferred seniority status for layoff purposes to certain union officers who do not perform steward-like functions in their official capacities as recording secretary, financial secretary-treasurer, trustee, and sergeant-at-arms. The judge also found the Respondent Company only secondarily liable for backpay because the Company did not stand to benefit from the Union's policy of granting superseniority to union officials and because when the Company became advised its policy regarding superseniority did not conform with the Board's interpretation of the law, it took prompt action to comply. We find no support for this limitation in the remedy here. The general rule is that an employer and union are jointly and severally liable for backpay where both the employer and the union have violated Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act, respectively.[1] In *Gulton Electro-Voice*, 266 NLRB 406 (1983), enfd. sub nom. *Electrical Workers IUE Local 900 v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984), and its progeny the Board has adhered to that remedy[2] and we see no basis for deviating from that remedy here. Accordingly, we substitute the following for the seventh and eighth paragraphs in the remedy section of the judge's decision, and we will modify the recommended Order and substitute a new notice.

Consequently the Respondent Union and the Respondent Company shall be ordered jointly and severally to make David Vandermeer, Robert Ballard, James Simpson, Jack Cox, and Charles Chapman whole for any loss of earnings and benefits resulting from their layoffs on 19 March 1982 and/or 1 July 1982, to the time of their reinstatement or retirement, whichever the case may be, such backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent Company, International Harvester Company, Canton, Illinois, its officers, agents, successors, and assigns, and the Respondent Union, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local Union No. 1145, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph A,2(a).

"(a) Jointly and severally with the Respondent Union make David Vandermeer, Robert Ballard, James Simpson, Jack Cox, and Charles Chapman whole for any loss of earnings and benefits they may have suffered as a result of the discrimination against them, in the manner set forth in the revised remedy section of this Decision."

2. Substitute the following for paragraph B,2(a).

"(a) Jointly and severally with the Respondent Company make David Vandermeer, Robert Ballard, James Simpson, Jack Cox, and Charles Chapman whole for any loss of earnings and benefits they may have suffered by reason of the discrimination against them, such lost earnings and benefits

[1] *Acme Mattress Co.*, 91 NLRB 1010 (1950), enfd. 192 F.2d 524 (7th Cir. 1951).

[2] *Ensign Electric*, 268 NLRB 620 (1984); *Niagara Machine & Tool Works*, 267 NLRB 661 (1983).

[3] The standard remedy where a respondent company's backpay obligation runs from the date of discrimination to the time of recall while a respondent union's obligation runs from the date of discrimination to 5 days after its notice to the company if it has no objection to the recall of employees does not apply here because all of the discriminatees have been reinstated previously or have retired.

to be determined in the manner set forth in the revised remedy section of this Decision."

3. Substitute the attached notices for those of the administrative law judge.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay off or refuse to recall employees from layoff by granting superseniority to officials or agents of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local Union No. 1145, unless such officials or agents are responsible for on-the-job grievance processing or on-the-job collective-bargaining contract administration.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT jointly and severally with the Union make David Vandermeer, Robert Ballard, James Simpson, Jack Cox and Charles Chapman whole for any loss of earnings and benefits they may have suffered as a result of their layoffs on 19 March and/or 1 July 1982, as ordered by the National Labor Relations Board.

INTERNATIONAL HARVESTER COMPANY

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause International Harvester Company to discriminate against employees in violation of the National Labor Relations Act by granting superseniority for layoff and recall from layoff to officials or agents of the Union who are not responsible for on-the-job grievance processing or on-the-job collective-bargaining contract administration.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT jointly and severally with the Company make David Vandermeer, Robert Ballard, James Simpson, Jack Cox, and Charles Chapman whole, as ordered by the National Labor Relations Board, for any loss of earnings and benefits they may have suffered by reason of their layoffs on 19 March and/or 1 July 1982.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS LOCAL NO. 1145

DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge. This matter was submitted to the Division of Judges on a stipulated record, signed by the parties on various dates in March 1983, and has been assigned to me for the issuance of a decision and other appropriate action. The order consolidating cases and the consolidated complaint issued on September 16, 1982 (all dates hereinafter are in 1982, unless otherwise noted).[1] An order amending the consolidated complaint was issued January 14, 1983.

The consolidated complaint, as amended, alleges that the above-named Respondent Union (the Union) violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act by invoking superseniority clauses in its bargaining agreement with the above-named Respondent Company (the Company) to prevent the layoff of certain named union officers, thus attempting to cause and causing the layoff of employees Ballard, Vandermeer, C.L. Guenseth (Guenseth), James Simpson (Simpson), and Jack Cox (Cox), who otherwise would not have been laid off. It is further alleged that the Company violated Section 8(a)(1) and (3) of the Act by complying with the Union's requests, thus discriminating against Vandermeer, Ballard, Guenseth, Simpson, and Cox and interfering with, restraining, and coercing its employees in the exercise of rights under the Act.

The answers to the complaint deny the unfair labor practices alleged, but admit allegations sufficient to justify the assertion of jurisdiction in this case under current standards of the Board (the Company, in the operation of a plant at Canton, Illinois, manufacturing tractors and agricultural equipment, during a recent annual period had goods and materials valued in excess of $50,000, shipped to its Canton plant directly from out of the State, and during the same period shipped from its Canton plant

[1] Charges and amended charges in Case 33-CB-1828 were filed by David Vandermeer (Vandermeer) on July 2, August 3 and 12, and December 27; a charge and amended charge were filed in Case 33-CB-1845 by Robert Ballard (Ballard) on August 16 and December 22; a charge was filed by Ballard in Case 33-CB-6119 on August 16; and a charge was filed by Vandermeer in Case 33-CA-6158 on September 9.

finished goods valued in excess of $50,000 to places outside the State of Illinois), and to justify a finding that the Union is a labor organization within the meaning of the Act.

On the entire record in this case, and after due consideration of the briefs filed by the General Counsel, Respondent Union, and Respondent Company, I make the following

FINDINGS AND CONCLUSIONS

I. THE FACTS

A. *The Bargaining Agreement*

At the times material to this proceeding the Company and the Union were parties to a collective-bargaining agreement which provided in pertinent part (Exh. 2, art. 16, sec. 14):

> (a) It is agreed that thirteen (13) designated Local Union Officers, the recognized committeemen and the recognized Stewards shall be accorded a preferred seniority status subject to the provisions hereinafter stated. . . .
>
> (b) The right to designate the persons who shall have such preferred seniority status shall be vested in the Union, provided that the list at all times shall include only employees in office and whose services are reasonably necessary for the conduct of the Local Union's business. . . .

Such preferred status is limited in the contract to layoff and recall to work only.

In accordance with the provisions of the bargaining agreement, the Union supplied the Company with a list of officers, committeemen, and stewards entitled to preferred seniority status, which included the following, with whose status we are primarily concerned here: recording secretary Dennis Derosear; financial secretary and treasurer Paul Fianciskovich; trustee Jack Poppenhager; and sergeant-at-arms Robert Clark.

It is noted that Franciskovich is also listed as an alternate steward in his department. However, footnote 3 to the stipulation of facts states that alternate stewards were not afforded superseniority status.

About September 21, because of an adverse decision of an administrative law judge in Cases 26-CA-9174, 26-CA-9312, 26-CB-1773, and 26-CA-1799, involving the application of preferred seniority at the Company's Memphis, Tennessee plant, the Company proposed that grants of preferred seniority to persons holding local union positions of trustee, sergeant-at-arms, and recording secretary be rescinded "to avoid any prospective liability."

About October 14, the Company and the Union executed a memorandum of agreement providing in pertinent part that "effective immediately all grants of preferred seniority to local union officers [holding] positions of Trustee, Sergeant-at-Arms, Recording Secretary, or Guide are immediately rescinded unless their duties also include administration of the Collective-Bargaining Agreement." The memorandum provided that, if the adverse decision in the Memphis cases were reversed, preferred status for these officers would be restored.

B. *The Layoffs*

After due notice, Respondent, on March 19, laid off approximately 26 of 43 employees in the unit involved here, including Vandermeer, Ballard, Simpson, and Charles Chapman (Chapman). Franciskovich, Derosear, Poppenhager, and Clark, who were retained, had less normal seniority than Vandermeer, Ballard, Simpson and Chapman, and would have been laid off before the four named employees but for their superseniority based on their union status.

About May 10, the Company recalled five of the laid-off unit employees, including Vandermeer, Ballard, Chapman,[2] and Simpson.

After due notice, Respondent, on July 1, laid off approximately 12 of its remaining 22 unit employees, including Vandermeer, Ballard, Cox, and Simpson. Again, Franciskovich, Derosear, Poppenhager, and Clark were not laid off due to their superseniority based on union status, though they had less normal seniority than Vandermeer, Ballard, Cox, and Simpson, and would have been laid off before these employees, except for their superseniority based on union status.

Vandermeer, Ballard, Chapman, Cox, and Simpson were qualified to perform the work that Franciskovich, Derosear, Clark, and Poppenhager performed on the occasion of these layoffs.

The Canton plant was shut down for vacation from July 5 to 25. Because of lack of work, financial secretary-treasurer Franciskovich and sergeant-at-arms Clark were laid off from September 3 to 27, and trustee Poppenhager and recording secretary Derosear were laid off from September 3 to October 11. By reason of the October 14 memorandum of understanding between the Company and the Union restricting preferred seniority, trustee Poppenhager and recording secretary Derosear were laid off on December 10, and Vandermeer, Ballard, and Simpson were recalled on December 13.

Cox, who had been laid off on July 1, retired as of October 31. Ballard, who was recalled from layoff on December 13, retired February 1, 1983.

C. *Functions of Union Officers*

The executive officers of Local Union No. 1145 (the Local Union) are its president, vice president, recording secretary, financial secretary-treasurer, three trustees, sergeant-at-arms, and guide. These officers constitute the local union executive board. As has been noted, we are here concerned primarily with the functions and duties of the financial secretary-treasurer, recording secretary, trustees, and the sergeant-at-arms. In pertinent part, they are as follows.

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[2] Thereafter, Chapman retired about June 1. Although he is not specifically mentioned in the complaint, his case has been fully stipulated and is of the same character and based on the same theory as the others. No party urges dismissal because of his omission from the complaint. Employee Guenseth mentioned in the complaint is not mentioned in the stipulation of facts.

The financial secretary-treasurer is responsible for collecting and disbursing local union income, including collecting checked-off dues at the company plant, payment of local union bills and expenses, and keeping local union financial records. The financial secretary-treasurer sends dues reports to the International Union, makes financial reports to the local union membership, and files necessary reports to the state and Federal governments. He also assists in audits of local union books, and issues withdrawal and transfer cards to members.

If a problem arises as to dues checkoff, including a problem raised by an employee, the financial secretary-treasurer may consult with the employee's supervisor, the company payroll department, the Company payroll records, payroll supervisors, and on occasion the company controller to resolve the problem. About once a week employees consult the financial secretary-treasurer in the plant concerning dues problems. The financial secretary-treasurer and the trustees administer the strike benefit fund. Eligibility for benefits is determined by records kept by the recording secretary.

During the times material to this proceeding, Paul Franciskovich (Franciskovich) was the financial secretary-treasurer of the Local Union. He was also elected the alternate day-shift steward and was appointed alternate chairman of the bargaining unit. He has served in these capacities three or four times a month, at least one day at a time and, on various occasions when the steward or the chairman has been absent, Franciskovich has served in their place for longer periods of time. Virtually every time he has served as steward or chairman, Franciskovich has handled grievances, dealing directly with company representatives. However, the stipulation of facts makes clear that these are not normal duties of the financial secretary-treasurer, as such, and Franciskovich was not accorded superseniority because of his position as alternate steward or alternate chairman of the bargaining unit at the times involved here. See footnote 3 to the stipulation stating that "alternate stewards and alternate committeemen were not afforded superseniority status."[3]

The duties of the financial secretary-treasurer set out above are performed at the local union hall, except that his activities in issuing transfer and withdrawal cards, resolving problems concerning checked-off dues, and answering employee questions about local union activities may be performed in the plant. Of course, Franciskovich's activities as alternate steward and alternate chairman of the bargaining unit may be performed in the plant, but these are not, so far as this record shows, part of his duties as financial secretary-treasurer.

As noted, the financial secretary-treasurer is a member of the executive board of the local union, as are the recording secretary, the trustees, and the sergeant-at-arms. Between membership meetings, the executive board is empowered to act on behalf of the membership of the local union subject to the approval of the membership. The executive board formulates bargaining proposals for the union; makes recommendations to the membership of the local union, after reports from the bargaining committee, on whether or not to ratify the bargaining contract and whether or not to strike; members of the executive board serve on the local union strike committee, serve as pickets, keep track of pickets, and answer questions from the membership and from the negotiating committee about the strike and from the members about the negotiations.[4] The executive board also decides who attends conferences and how funds for those conferences are allocated.

Except in special cirumstances, such as picketing, the executive board performs its responsibilities at the local union hall about a block away from the plant. The executive board, as such, does not meet with the Company in regard to grievances.[5] However, the executive board does hear appeals from members complaining of grievance handling decisions of the grievance/bargaining committee, and may on appeal of a grievance previously withdrawn or settled reinstate the grievance. Such functions would normally be performed at the union hall, though on occasion board members may be polled while at work at the plant.

The recording secretary is responsible for keeping a record of the proceedings of the local union, conducting its general correspondence, including correspondence with the Company regarding negotiations. The recording secretary keeps records of membership meetings and meetings of the executive board at which matters concerning negotiations and grievances are often discussed, and keeps records of pickets on which eligibility for benefits are determined. He performs other recordkeeping, research, and reporting duties required by the constitution and the local union bylaws. As has been noted, the recording secretary is also a member of the local union executive board.

The trustees of the local union are responsible for the general supervision over all funds and property of the local union. They are also members of the executive board.

The sergeant-at-arms of the local union is responsible for introducing new members and visitors at union meetings, assisting the local union president in maintaining order at union meetings, and taking charge of the local union's property.

According to the stipulation of facts, if the local union president is absent or unavailable, the next ranking officer substitutes for the president in grievance meetings or negotiations. The order of substitution is as follows: vice president, recording secretary, financial secretary-treasurer, trustees, sergeant-at-arms, and guide.

[3] Significantly, Franciskovich was not listed as alternate chairman of the bargaining unit in the list of officers supplied by the Union to the Company (Exh. 5) for the purposes of preferred seniority, though the stipulation states that he was appointed to that position about 6 years previously.

[4] According to the stipulation of facts, all officers are approached in the plant, some more than others, to answer questions about union business, the status of negotiations, what happened at a union meeting, or concerning grievances.

[5] The grievance procedure in the bargaining agreement between the Company and the Union (Exh. 2, art. VI) does not provide for participation by the executive board, as such, or by the financial secretary-treasurer, or the recording secretary, the trustees, or the sergeant-at-arms.

II. ANALYSIS AND CONCLUSIONS

It has long been recognized that the grant of superseniority to union stewards and other union officers so that they receive preferred treatment in respect to hire, tenure, and conditions of employment, because of their union status, is inherently discriminatory. Unless such discrimination can be otherwise justified, it is a violation of the Act. See *Gulton Electro-Voice*, 266 NLRB 406 (1983). In *Gulton*, the Board, reversing previous cases, held that "the grant of superseniority to those who do not perform steward or other on-the-job contract administration functions is not justified."

We are here concerned with the application of superseniority (otherwise called preferred seniority) to persons occupying the status of financial secretary-treasurer, recording secretary, trustee, and sergeant-at-arms of the local union, so that these persons were retained when they otherwise would have been laid off except for the possession of such union status. As a result, employees with greater normal seniority than these union officers, but without union status, who would have been retained under the normal operation of the bargaining agreement, were laid off.

In the circumstances of this matter, I find that by granting superseniority to the union financial secretary-treasurer, recording secretary, trustee, and sergeant-at-arms, causing the layoff of other employees with greater normal seniority, the Union and the Company, Respondents here, violated the Act.

The union sergeant-at-arms, whose primary functions involve protocol and keeping order at union meetings, clearly does not perform steward or other on-the-job contract administration functions justifying preferred seniority status. Though the sergeant-at-arms is a member of the executive board, that board does not, either individually or collectively, perform steward-like functions or on-the-job administration of the bargaining agreement. Similarly, the fact that the sergeant-at-arms may be seventh in line to perform the functions of the president in grievance meetings or negotiations when the president is not available does not justify affording the sergeant-at-arms preferred treatment in layoffs and recalls to work. As I read *Gulton*, the Board found justified preferred treatment for those who on an on-the-job basis regularly represent employees or administer the bargaining contract but not those who may perform those functions on an indeterminate or purely occasional basis. Such officers are readily substituted for without damage to the employees' rights or the administration of the contract.

Similarly, *the trustees'* primary functions have to do with the Union's property. Though they are members of the executive board, and are fourth, fifth, or sixth in line to substitute for the president of the Union, these functions are not sufficient to afford the trustees preferred status, as discussed above.

The recording secretary keeps the union records and conducts its general correspondence at the union hall, including correspondence with the Company concerning negotiations. He is also a member of the executive board and second in line to substitute for the president. For the reasons discussed in connection with the sergeant-at-arms, those functions do not justify preferred status.

The financial secretary-treasurer of the local union, like the financial secretary-treasurer in *Gulton*, has responsibilities that are primarily financial. In the course of such duties he does attempt to resolve problems concerning checked-off dues, but it seems clear that these are not considered grievances that are processed under the grievance procedure of the bargaining agreement. The contract makes no provision for the financial secretary-treasurer to perform grievance functions, nor does the stipulation indicate that problems with dues are processed as grievances. Also for reasons discussed hereinabove, the financial secretary-treasurer is not entitled to preferred seniority because of membership on the local union executive board, or because he is in line, on occasions when the local union president, vice president, and the recording secretary are all absent, to substitute for the local union president.

Franciskovich, who was the local union financial secretary-treasurer during the times with which we are here concerned, was also an appointed alternate chairman and elected alternate steward. As such he may have performed duties justifying preferred treatment in layoff and recall under the principles laid down in *Gulton*. However, as has been noted, Franciskovich was not granted preferred seniority because he occupied the position of alternate steward or alternate chairman, or performed the duties associated with those positions. That being so, the stipulation of facts concerning those positions and the functions inherent in those positions is irrelevant.

Therefore, based on the above, and the record as whole, I find that, by improperly designating the local union recording secretary, the financial secretary-treasurer, trustees, and sergeant-at-arms as entitled to superseniority under the bargaining agreement, thus causing the layoffs of David Vandermeer, Robert Ballard, James Simpson, Jack Cox, and Charles Chapman, who otherwise would not have been laid off, Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act, and Respondent Company, by the layoff of those employees has violated Section 8(a)(1) and (3) of the Act.[6]

In coming to these conclusions I have carefully considered Respondent Company's contentions that the Company should not be held to have violated the Act in this case because (1) it was "complying with its contractual obligation to accord designated Local Union officials preferred seniority status for layoffs and recalls" (Br. 9–10), (2) *Gulton* should be applied only prospectively and should not affect conduct occurring before March 7, 1983, the date of the *Gulton* decision (Br. 12), and (3) "absent actual knowledge or reasonable grounds to suspect that the Union was improperly exercising its vested rights to designate those persons entitled to preferred status," the Company cannot be held to have violated the Act. (Br. 13.)

I find these contentions without merit. The fact that the Company's actions were in compliance with the bargaining contract will not justify such conduct, if it is, as

[6] The record shows that employees other than the named employees were laid off when they were. However, the record does not show that these other employees were discriminated against by reason of the grant of superseniority to the officers of the Union.

I find, in violation of the Act. Respondent Company's argument that the principle in *Gulton* cannot apply to conduct occurring before the date of the Board's decision in that case is difficult to follow. If applied literally it seems to mean that though the Board may announce a new principle in a case before it—as in *Gulton*—it may not find the conduct in that case, occurring before the date of the decision, to be violative of the Act. But the Supreme Court has held that the Board may properly alter principles of conduct under the Act and find violations of those principles on a case-by-case basis. See *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

It may be, however, and I have assumed that the Company by this argument takes the position that no remedy should be provided for the employees who were laid off before *Gulton* was decided. This will be considered hereinafter, together with a similar argument by Respondent Union, in connection with the discussion of the Remedy.

Respondent Company's final argument is that it should not be held to have violated the principles laid down in *Gulton* because it was unaware of the duties and responsibilities of the officers designated by the Union to be accorded superseniority. However, the Company was aware that the collective-bargaining agreement did not restrict superseniority only to union officers who performed on-the-job grievances or contract administration, as required by *Gulton*.[7] The record establishes, as previously found, that the recording secretary, the financial secretary-treasurer, the trustees, and the sergeant-at-arms do not perform on-the-job duties of stewards or otherwise administer the bargaining contract on the job. Since these functions normally and regularly would involve dealing with the Company, it is my conviction and I infer and find that Respondent Company had reasonable cause to believe that these four union officers did not perform on-the-job steward duties or were engaged, on the job, in the administration of the contract.

In any event, it has long been established that in granting superseniority to union officers for union-related reasons an employer (as well as the union involved) thereby discriminates against other employees in violation of the Act, absent proper justification. See *Gulton*, supra. Respondent Company may not here avoid the consequences of its discriminatory action by urging it was unaware that its justification for such discrimination was deficient.[8]

[7] The bargaining agreement provides that the Union shall designate those persons entitled to preferred seniority whose services are "reasonably necessary" for the conduct of the local union's business.

[8] Respondent Company cites *Postal Service*, 254 NLRB 74 (1981); *Explo, Inc.*, 235 NLRB 918 (1978); and *Union Carbide Corp.*, 228 NLRB 1152 (1977), in support of its position. I find these decisions distinguishable. In *Postal Service* and in *Explo*, it was held that the unions there violated the Act by the invidious method of selection of stewards for superseniority, but that the companies did not violate the Act by according those stewards superseniority because it was unaware of the improper selection of stewards. In *Union Carbide*, it was held that proper justification was shown for an aberrant application of superseniority.

CONCLUSIONS OF LAW

1. Respondent Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By improperly designating the local union recording secretary, financial secretary-treasurer, trustees, and sergeant-at-arms as entitled to superseniority under the bargaining agreement between the Union and the Company, causing Respondent Company to discriminatorily lay off David Vandermeer, Robert Ballard, James Simpson, Jack Cox, and Charles Chapman, who otherwise would not have been laid off, Respondent Union violated Section 8(b)(1)(A) and (2) of the Act, and Respondent Company, by discriminatorily laying off the named employees for various periods of time, violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Union and Respondent Company have engaged in certain unfair labor practices, it will be recommended that they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent Company discriminatorily laid off employees in violation of Section 8(a)(3) and (1) of the Act because Respondent Union, in violation of Section 8(b)(1)(A) and (2) of the Act, designated certain union officials to be accorded superseniority under the bargaining agreement though those officials were not entitled to such status under the Board's decision in *Gulton Electro-Voice*, supra.

Of the named employees (Vandermeer, Ballard, Simpson, Cox, and Chapman) found to have been discriminatorily laid off on March 19, 1982, and/or July 1, 1982, it appears that Vandermeer and Simpson have been reinstated and Ballard, Cox, and Chapman have retired from employment with the Company. The General Counsel in his brief does not request reinstatement.

With respect to backpay, Respondent Union argues that, notwithstanding the violations of the Act found in this case, backpay should be tolled for the time prior to the Board's decision in *Gulton*, inasmuch as, the Union alleges, its actions in this proceeding were legal under the law prior to the decision in *Gulton*. Respondent Company seems to agree with this position and also argues that it should be held only secondarily liable for backpay in the circumstances.

Before 1962, the Board on occasion tolled backpay, as in instances in which the Board reversed the findings of the trial examiner (now administrative law judge) that an employee's termination did not violate the Act. In 1962, this policy was reversed, and, as stated by the court in *NLRB v. R. J. Smith Construction Co.*, 545 F.2d 187 at 192 (D.C. Cir. 1976), "In essence, the [Board's] present policy is not to toll back pay awards, absent 'special factors' which render back pay inappropriate to effectuate the policies of the Act." This policy was confirmed by

the Board in *Ferrell-Hicks Chevrolet*, 160 NLRB 1692 (1966), in which the two cases cited by Respondent Union[9] were distinguished on the grounds that there were "special factors" justifying tolling backpay in those cases. I am unaware of any case since *Ferrell-Hicks* in which the Board has tolled backpay.

Respondent Union does not here advance any "special factors"—other than its asserted reliance on the Board's decision prior to *Gulton*—which would serve to justify a departure in this proceeding from the Board's normal remedy requiring restoration of the status quo for employees whose rights under the Act have been thus violated. The grant of superseniority to the union officials involved here was a particular benefit to the Union, not to the employees, who, indeed, lost their jobs thereby. There is no reason the burden of paying for such union policy should be shifted to the employees, where the implementation of the union policy has been found to violate the Act. To toll backpay here would place the cost of the Union's erroneous policy on the employee victims of that policy instead of on those parties who were responsible for formulating and carrying it out. For these reasons, I find that backpay in this case should not be tolled.

However, Respondent Company's request that it should be held only secondarily liable for backpay in this case has more merit. So far as appears, the Company did not stand to benefit from the Union's policy granting superseniority to the union officials involved, and the facts show that, when the Company became advised that this policy did not conform with the Board's interpretation of the law, it took prompt action to bring its practices in compliance with the Act. For the reasons stated, it will be recommended that Respondent Company be held only secondarily responsible for backpay in this matter.

Based on the above, it will be recommended that Respondent Union and Respondent Company shall be ordered jointly and severally, with Respondent Union primarily, and Respondent Company secondarily liable, to make David Vandermeer, Robert Ballard, James Simpson, Jack Cox, and Charles Chapman whole for any loss of earnings and benefits resulting from their layoffs on March 19, 1982, and/or July 1, 1982, such backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

A. Respondent International Harvester Company, Canton, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or failing to recall employees from layoff by granting superseniority to officials or agents of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local Union No. 1145, unless such officials or agents are responsible for on-the-job grievance processing or on-the-job collective-bargaining contract administration.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights protected by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which, it is found, will effectuate the policies of the Act.

(a) Jointly and severally with Respondent Union, but with Respondent Company secondarily liable, make David Vandermeer, Robert Ballard, James Simpson, Jack Cox, and Charles Chapman whole for any loss of earnings and benefits they may have suffered as a result of the discrimination against them, in the manner set forth in the section of this decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from its records any reference to the layoff of David Vandermeer, Robert Ballard, James Simpson, Jack Cox, and Charles Chapman on March 19 and/or July 1, 1982, and do not use evidence of their unlawful layoff as a basis for future personnel actions against them.

(d) Post at its operations at Canton, Illinois, copies of the attached notice marked "Appendix A."[11] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by Respondent Company's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Company to ensure that such notices are not altered, defaced, or covered by any other material.

(e) Post at the same places and under the same conditions set forth in paragraph A,2,(d), above, as soon as forwarded by said Regional Director, copies of the attached notice marked "Appendix B."

(f) Mail signed copies of the attached notice marked "Appendix A" to the Regional Director for Region 33 for posting by Respondent Union.

[9] *Kohler Co.*, 148 NLRB 1434 (1964), and *Fibreboard Corp.*, 138 NLRB 850 (1962).

[10] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps that Respondent Compay has taken to comply.

B. Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local Union No. 1145, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Respondent Company to discriminate against employees, in violation of Section 8(a)(3) of the Act, by granting superseniority for layoff and recall from layoff to officials or agents of the Respondent Union who are not responsible for on-the-job grievance processing or on-the-job collective-bargaining contract administration.

(b) In any like or related manner restraining or coercing the employees of Respondent Company in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the polices of the Act.

(a) Jointly and severally with Respondent Company, but with Respondent Union primarily liable, make David Vandermeer, Robert Ballard, James Simpson, Jack Cox, and Charles Chapman whole for any loss of earnings and benefits they may have suffered by reason of the discrimination against them, such lost earnings and benefits to be determined in the manner set forth in the section of this decision entitled "The Remedy."

(b) Post at its office and meeting halls used by or frequented by its members and employees it represents at Respondent Company's Canton, Illinois facility copies of the attached notice marked "Appendix B."[12] Copies of the notice, on forms provided by the Regional Director for Region 33, shall be posted by Respondent Union after being signed by Respondent Union's authorized representative, immediately upon receipt. The foregoing notice shall be maintained by Respondent Union for 60 consecutive days after posting in conspicuous places where notices to the above-named members and employees are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Post at the same places and under the same conditions as set forth in paragraph B,2,(b), above, as soon as forwarded by said Regional Director, copies of the attached notice marked "Appendix A."

(d) Mail signed copies of the attached notice marked "Appendix B" to the Regional Director for Region 33 for posting by Respondent Company.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent Union has taken to comply.

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[12] See fn. 10 above.